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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 637

CHARLES D. RICE, ET AL., TRUSTEES,
Petitioners,

vs.

ABRAHAM S. GUTERMAN, TRUSTEE IN BANKRUPTCY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PAUL A. DEVER,
EDWARD O. PROCTOR,
ARTHUR P. STONE,
Counsel for Petitioners.

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CHARLES D. RICE, ET AL., TRUSTEES,
Petitioners,

vs.

ABRAHAM S. GUTERMAN, TRUSTEE IN BANKRUPTCY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioners, Charles D. Rice, Robert H. Sanderson, and Vernon L. Balcom, Trustees under an Indenture of Trust, pray a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered June 23, 1941 (R. 45), reversing with directions the judgment of the District Court of the United States for the District of Massachusetts entered January 6, 1941 (R. 25) 121 F. (2d) 251.

Statement of the Matter Involved.

The Rice Chocolate Company, a Massachusetts corporation, executed a mortgage of personal property to the

Old Colony Trust Company, a Massachusetts banking corporation, to secure an issue of bonds. The petitioners are the successors to the trustee mortgagee. This mortgage was dated November 1, 1934 and was duly recorded in the City Clerk's office in the City of Everett on November 6, 1934. It was never recorded in the City Clerk's office in the City of Boston. The Massachusetts statute with regard to the record of such mortgages requires that it must be recorded on the records of the town where "the mortgagor resides when the mortgage is made, and on the records of the town where he then principally transacts his business". No question has been raised that the mortgage was properly recorded in Everett. This was admitted to be the only place where the mortgagor transacted any business. The contention of the respondent trustee in bankruptcy is that it also should have been recorded in Boston which was the only place where the corporation "resided".

The facts summarily stated are these. The mortgagor corporation was organized under the general corporation law of Massachusetts in 1914. In its articles of organization it stated that its principal office was located in Boston. It did business in Boston until 1925 when it moved to Everett. This was a complete removal and after that date the corporation had nothing to do with Boston. "It never again opened any office in Boston. It had as early as January 1, 1926 completely given up every place of business and business activity in Boston. It had no mailing address, no telephone listing, no salesroom, no factory and no property whatever in Boston. It was located in Everett for the purposes of taxation, automobile registration, dishonor of commercial paper, and legal processes. From 1926 on, it filed 12 annual certificates of condition with the Commissioner of Corporations, stating in each that its principal office was in Everett. It twice issued capital stock and said that it was "located" at 7 Charlton Street, Everett.

It amended its articles of organization when it increased its capital stock and again when it later reduced its capital stock, stating at all times that it was located in Everett. All papers thus filed were approved by the Commissioner of Corporations. It went into Rhode Island and there, too, stated itself as of Everett, Mass. It also amended its by-laws and stated that "The principal office of the corporation shall be located in Everett". Everything else that could possibly have been done to change its principal office was done prior to the date of recording the mortgage in question. The mortgage had been executed eight years after the corporation had moved from Boston to Everett and at all times since that moving the corporation had held itself out as having its principal office and principal place of business in Everett. It appears from the evidence that nobody was deceived at any time or was led to believe that the corporation was a resident of Boston when such was not the fact. Not even a nominal office was maintained in Boston after 1925 and no one could have been misled even if he had inquired at the Secretary of State's office where subsequent certificates of condition stated Everett as the city where its principal office and place of business was located" (R. 8 and 9).

The corporation was petitioned into bankruptcy on September 24, 1938. The petitioner trustees started to foreclose the mortgage. The trustee in bankruptcy (then Receiver in Bankruptcy) sought to restrain the sale. By a stipulation of the parties the sale took place and the net sum realized is held awaiting the determination of these legal proceedings. The issue now presented is a narrow one which may be stated as follows:

It is conceded that the mortgage was properly recorded in Everett which was where the corporation had its usual place of business. *Did it also reside there or was Boston its only place of residence?*

The petitioners contended and the referee and the Judge of the District Court have found that it had a residence in Everett and that consequently the mortgage was properly recorded.

The Circuit Court of Appeals, while stating that the result is unfortunate, rules that until a corporation amends its Articles of Organization and formally records the Amendment it still "resides" at the place stated in the Articles of Organization as the location of its "principal office," and cannot in any way gain a residence anywhere else. In other words, the *only* place of residence of a Massachusetts corporation is the place stated in its Articles of Organization and the corporation can only gain a new residence by amending those Articles of Organization. And this is true even when no trace of the corporations activities can be found where it so "resides". It is held that by a legal fiction the corporation's only residence is where it cannot be found. In this case while ordinary men under ordinary laws and for ordinary purposes would consider Everett as one of its residences, at any rate, by some sort of legal legerdemain for the recording of a chattel mortgage, it must still be held to reside in Everett where it had not resided for any purpose for ten years.

Reasons for Granting the Writ.

The granting of the writ of certiorari by this Honorable Court is a discretionary matter. The petitioner urges that it should be granted to prevent an "unfortunate result under the circumstances" to borrow the language used by the Circuit Court of Appeals. In other words, it is asserted by the Circuit Court of Appeals that this is one of those cases where injustice must be done because of a technical but alleged correct interpretation of a Massachusetts statute. The petition submits that that interpretation is not correct, because:

I. *It is not in accord with the law as laid down by the Supreme Judicial Court of Massachusetts.*

II. *It is contrary to the interpretation given the statute in question and the facts found under it, by a Massachusetts judge in the United States District Court for the District of Massachusetts.*

III. *The Circuit Court of Appeals bases its decision upon a single case decided in 1916 stating the law as to the State of Illinois but in order to preserve its authoritative value asserts that, in the statement of facts upon which it is based, the United States Supreme Court made a mistake.*

IV. *The decision is not in accord with more recent decisions of this Honorable Court.*

I.

The decision is not in accord with the law as established in Massachusetts.

A. In the first place, Massachusetts courts have many times stated that "residence" and "domicil" are not synonymous and that "residence" imparts actual presence with the purpose of remaining for an undetermined period. "It (residence) imparts reality as distinguished from form",

Marlborough v. *Lynn*, 275 Mass. 394, 397;
Jenkins v. *North Shore Dye House*, 277 Mass. 440;
Tuells v. *Flint*, 283 Mass. 106.

Indeed, a person may have more than one residence even in the same State and the determination is a question of fact.

Harnden v. *Smith*, 305 Mass. 485, 487;
Doyle v. *Goldberg*, 294 Mass. 105, 108;
Avila v. *Dupont*, 278 Mass. 83.

And this is true of a corporation.

Gondek v. *Cudahy Packing Co.*, 233 Mass. 105.

B. The residence of a business corporation in Massachusetts is where it actually transacts its business and not where it merely maintains a legal office. "It often has been held respecting a business corporation that its residence is in the place where its manufacturing, mercantile or other chief activities are carried on, and not where only its corporate or directors meetings are held, or its records are kept. (See cases cited.) The decisions in the many English cases where the question has been considered rest upon the well established principle that the residence of a trading or business corporation is to be determined by ascertaining where its 'real trade and business is being carried on', or (to use a phrase having both German and French juristic equivalent) 'where is the central point of its business' (cases cited)."

Parker v. *Proprietors of Cemetery of Mt. Auburn,* 217 Mass. 286.

The development of the law in Massachusetts shows this. Originally in Massachusetts as in many other States, corporations had no residence or "commorancy".

Taunton & So. Boston Turnpike Co. v. *Whiting,* 9 Mass. 320 (1812).

In 1836, however, the Massachusetts legislature gave corporations a residence for legal actions. This was where the corporation had "any established or usual place of business".

Mass. Revised Statutes (1836), Chapter 90, Section 16.

In passing this statute, the object of the legislature was to cure the decision in the case of *Turnpike Co.* v. *Whiting* (cited *supra*), and "to give corporations a species of locality in the nature of domicil and to determine where they should be held to be resident".

Raymond v. *City of Lowell,* 6 Cushing 524, 529.

Also in 1836 in the chapter relating to the construction of statutes the legislature said "The word 'person' may extend and be applied to bodies politic and corporate as well as to individuals".

Revised Statutes (1836), Chapter 2, Section 6, Clause 13.

Under this statute a corporation was held to "dwell" in the country "where they had their place of business and held their meetings".

Lucas v. *Nichols*, 5 Gray 309.

Also in 1836 the recording of personal property mortgages was regulated much as at the present time. It had to be recorded "by the clerk of the town where the mortgagor resides".

Revised Statutes (1836), Chapter 74, Section 5.

A corporation could mortgage its property.

Burrill v. *Nahant Bank*, 2 Metcalf 163 (1837).

Potter v. *Boston Locomotive Works*, 12 Gray 154, 158, 159 (1854).

That mortgage must be recorded obviously where the corporation resided.

At that time certainly it could not be the place named in the "Articles of Organization" or anything resembling them because nothing of the sort was known to the law.

It was not until 1851 that any business corporation law was established in Massachusetts and it was not until 1870 that Articles of Organization, as now provided for, were required to be deposited with the Secretary of State and a charter issued.

Acts of 1870, Chapter 244, Section 7.

And in 1877 the right of a corporation to change its "location" either *in whole* or *in part* was recognized by statute obviously without amending its Articles of Organization.

An act authorizing manufacturing and other corporations to change their locations.

Acts of 1877, Chapter 67.

Could a corporation which had the power to wholly change its "location" be said not to have changed its "residence"?

It seems obvious that as a corporation could mortgage its property and as that mortgage must be recorded where the mortgagor resided it was necessary that it be recorded where it carried on its business.

In 1843 to cover the situation arising where a person carried on his business where he did not reside and his residence might not be generally known, it was provided that a personal property mortgage should be recorded not only where the mortgagor resides but also by the "clerk of the city or town in which he principally transacts his business or follows his trade or calling".

Acts of 1843, Chapter 72, Section 2.

Nothing was said with regard to corporations and the statute was nugatory with regard to them as in the condition of the law at that time (as at the present time) residence of a business corporation and the place of its business activities were identical.

This statute is practically the same at the present time. Under such circumstances, if as the opinion in this case says, it has become "redundant" the redundancy occurred many years after its passage without further legislative action.

From the foregoing it seems evident that the residence of a Massachusetts corporation from 1836 to the present time has been as stated "Where its manufacturing, mercantile or other chief activities are carried on and not where only its corporate or directors meetings are held or its records are kept".

Parker v. *Mt. Auburn Cemetery,* 217 Mass. 286 (1914), cited *supra.*

And this is not a novel doctrine in Massachusetts.

"But partnerships like corporations may have a residence. A corporation is usually held to dwell at the place where it carries on its business."

Ricker v. *American Loan & Trust Co.*, 140 Mass. 346, 350 (1885).

In receivership proceedings, which are analogous to bankruptcy, a New Hampshire corporation was held to have its "actual home" in Massachusetts where all its business was carried on. And Webster defines "residence" as "the place where one actually has his home".

Garham v. *Mutual Aid Association*, 161 Mass. 357, 365, 366.

See also,

Boynton v. *Middlesex & Mutual Fire Insurance Company*, 4 Metcalf 212, 215.

Massachusetts courts still adhere to the statement made in the case of *Parker* v. *Mt. Auburn Cemetery Co.* (cited *supra*).

The next year after the decision was made it came to the attention of the court in a case in which the record of a chattel mortgage was involved. The mortgage was not recorded in Boston where all the corporate activities were carried on and where its "principal office" was obviously located. Where it was recorded does not appear in spite of the assertion in the opinion of the Circuit Court of Appeals. If this corporation either had its "residence" in Boston or principally transacted its business there it is plain that the mortgage should have been recorded in Boston. The court held that it did not have to be recorded in Boston and cites with approval the statement in the *Mount Auburn Cemetery* case.

Federal Trust Co. v. *Bristol County St. Ry. Co.*, 218 Mass. 367, 375 (1914).

Later the Massachusetts court based the question of residence upon the place where it had "its usual place of business" (not its "principal office") and cited with approval the *Mount Auburn Cemetery* case.

Harvard Trust Co. v. *Commissioner of Corporations,* 284 Mass. 225, 227 (1933).

No Massachusetts court has ever held that the only place of "residence" of a corporation organized under its laws is that place set down as the location of its "principal office" in the Articles of Organization. On the other hand, the Massachusetts courts have many times said that a corporation "resides" where it carries on its business. This is the law in England and in many jurisdictions in this country.

A case directly in point in Maine, which was originally a part of Massachusetts, holds that a conditional sale contract made by a corporation must be recorded where the corporation "resides", i.e. where it had its established place of business.

Emerson Company v. *Proctor,* 97 Maine 360.

So a Theatre corporation was held to be a "resident" of Providence where its theatre was located

Providence Theatre Co. v. *District Court,* 38 R. I. 12, 15.

Numerous other jurisdictions hold the same view:

Osborne Co. v. *City of Osborne,* 104 Kansas 671, 673;

Sanders v. *Farmers State Bank of Mexico,* 228 S. W. 625 (Texas);

Detroit Transportation Co. v. *Detroit,* 91 Michigan 382;

Intersouthern Life Insurance Company v. *Milliken,* 149 S. W. 875, 882 (Kentucky);

Milwaukee Steamship Company v. *Milwaukee,* 83 Wisconsin 590, 596;

Woodsum Steamboat Company v. *Sunapee,* 74 N. H. 495.

It is submitted that the Circuit Court of Appeals has gone out of its way to align Massachusetts with a view to which no Massachusetts court has ever given adherence and thus bring about an inequitable and, to borrow the language of that court itself, an "fortunate result".

II.

It is contrary to the interpretation given the statute in question and the facts found in the case by a Massachusetts judge in the United States District Court for the District of Massachusetts.

As has been stated the Legislature has never attempted to define the word "reside" in the chattel mortgage statute as having a different meaning from the word when used elsewhere. And up to 1870 when the general corporation was passed, no such distinction could have been made. Since that time neither the Legislature nor the courts have made any attempt to recognize a change. Residence in Massachusetts is held to be a question of fact.

Opinion of the Justices, 5 Metcalf 587;
Doyle v. *Goldberg,* 294 Mass. 105, 108;
Harnden v. *Smith,* 305 Mass. 485, 487.

The referee found as a fact upon the evidence before him, that this corporation had a residence in Everett (R. 15).

And the judge of the District Court has affirmed that finding.

Whether it might have been held to have a technical domicil in Boston is beside the point. Its "residence" might well be elsewhere.

International Milling Company v. *Columbia Transportation Company,* 292 U. S. 511, 519.

III.

The Circuit Court of Appeals bases its decision upon a single case decided in 1916 stating the law as to the State of Illinois but in order to preserve its authoritative value asserts that in the statement of facts upon which it is based the United States Supreme Court made a mistake.

This seems to the petitioner to raise a novel method of interpreting judicial precedents.

The main reliance of the trustee in bankruptcy and set forth in the opinion of the Circuit Court of Appeals is

Fairbanks Steam Shovel Company v. Wills, 240 U. S. 642 (1916).

This case is in many respects similar to the case under consideration. It has, however, one difference which is vital upon the question of residence. Although the corporation there considered had moved most of its activities out of Chicago in the language of the United States Supreme Court "An office was nominally maintained in Chicago".

The case would be more nearly in point if the Rice Chocolate Company, after moving to Everett, had for purposes of its own, maintained an office in Boston. It might then be argued that having elected to preserve its Boston residence it could not blow hot and blow cold at the same time. It did not do so. After 1925 "not even a nominal office was maintained in Boston and no one could have been misled even if he had inquired at the Secretary of State's office where subsequent Certificates of Condition stated Everett as the city where its principal office and place of business was located" (R. 9).

To meet this obvious difference the trustee in bankruptcy urged and the Circuit Court of Appeals brushed this vital distinction aside with the assertion that the Supreme Court was wrong in its statement of facts.

121 F. (2d) 251, 255.

It is, however, "the law of the case." It stands as the rule and measure of right, binding on court and parties.

The petitioners submit that they are not obliged to re-argue and defend the statement of facts in a decision of this court. As an authority the cited case is the case of a corporation which had tried to preserve its original residence and continued to maintain a nominal office. It is vitally different in that respect from the case under consideration.

If there was a mistake as to the facts and the highest court in the land can be corrected by a master's statement before the court appealed from, the only possible effect is to destroy the case as an authority for anything. Your petitioner is helpless if opinions of this court can be twisted out of their natural meaning and made an authority for something this Court has never held.

With the case cited in mind, the petitioner maintains that no court in Massachusetts or elsewhere has held that a corporation which did not maintain even a nominal office in a city, that could not be found there for any purpose was still a "resident" of a place where it was not and where it had not been and could not have been found for at least ten years.

IV.

The decision is not in accord with more recent decisions of this Honorable Court.

The law with regard to the residence of a corporation has undergone marked changes in recent years.

At first as has been seen, it could have no domicile.

"A corporation is a mere ideal existence, subsisting only in contemplation of law; an invisible being which can have,

in fact no locality and can occupy no space; and therefore cannot have a dwelling place."

Wood v. *Hartford Fire Insurance Co.*, 13 Conn. 202, 209.

See also

Taunton & So. Boston Turnpike Co. v. *Whiting*, 9 Mass. 320 (1812), cited *supra*.

This remained in the mind of lawyers (and judges) for years. "Domicil" and "residence" were confused. A corporation was a fiction and everything about it was fictitious.

Ex parte Schollenberger, 96 U. S. 369.

Under modern industrial development this concept had to give way. Corporations did business as did individuals and there was no more difficulty in determining where they did business than arose in the case of individuals. State courts, as has been seen, departed from the old idea that "residence" was a fiction. And their conclusions are not at odds with the decisions of this Honorable Court.

"For many purposes its domicile in law is in the state of its creation, but it is living its life elsewhere. In a very real and practical sense it is a resident of the forum."

International Milling Company v. *Columbia Trans. Co.*, 292 U. S. 511, 519 (1934).

"The plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state."

St. Louis, B. & M. Ry. Co. v. *Taylor*, 266 U. S. 200, 207 (1924).

See also

First Bank Stock Corp. v. *Minnesota*, 301 U. S. 234 (1937).

Can there be any question that the Rice Chocolate Company on the fact was "living its life" in Everett; that it had its "usual place of business" and hence its "residence" in Everett.

Conclusion.

Can it be possible that the citizens of Massachusetts are to be told that a corporation which for taxation, for automobile registration, for service of process and for dishonor of commercial paper confessedly resided in Everett, is to be allowed to escape an honest debt and enrich creditors who always supposed it resided in Everett and dealt with it there because at the time of this incorporation it said its "principal office" was in Boston when that statement had not been true and the corporation had not pretended it was true for over ten years? Must the holder of a mortgage of a corporation run down its acts of incorporation before recording it when for every practical intent and purpose its residence is apparent and is a matter of record.

No statute of Massachusetts says that the "principal office" of a corporation and its "residence" are synonymous. No Massachusetts court has ever said so. There was no qualification or limitation in the following statement of the court.

"It often has been held respecting a business corporation that its residence is in the place where its manufacturing, mercantile or other chief activities are carried on, and not where only its corporate records are kept."

Parker v. *Mount Auburn Cemetery Corp.*, 217 Mass. 286 (cited *supra*).

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its

supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
OCT 16 1941
CHARLES ELMORE CROPLEY
CLERK

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October Term, 1941.

No. 637.

Charles D. Rice et al., Trustees,
Petitioners,

v.

Abraham S. Guterman, Trustee in Bankruptcy,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 637.

CHARLES D. RICE ET AL., TRUSTEES, *Petitioners,*

v.

ABRAHAM S. GUTERMAN, TRUSTEE IN BANKRUPTCY, *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Statement of the Case.

For an accurate statement of the case, this Court is referred to the opinion of the Circuit Court of Appeals rendered on June 23, 1941 (R. pp. 35-45).*

The petitioners' statement is substantially correct except that it fails to include the important fact—conceded from the very beginning (R. 9)—that the stockholders of the bankrupt corporation never voted to authorize a change of the location of the corporation's principal office or place of business, as required by section 41 of chapter 156 of the Massachusetts General Laws (Ter. Ed.), nor were any articles of

*This decision has been officially reported in 121 F. (2d) 251.

amendment filed setting forth that the location had been changed, as required by section 43 of this chapter (R. 7),* nor does the statement mention the referee's findings (which may have a bearing on the applicability of the *Fairbanks* case, relied upon by the respondent, and upon the attempts of the petitioners to distinguish that case) to the effect that "at all times, the record book of the corporation was kept in Boston, at the office of counsel for the corporation" (R. 7), and that "meetings of the stockholders and directors were held at various places, including Boston, Cambridge and Belmont and no meetings ever took place in Everett" (R. pp. 7-8).

Controlling Statutes.

Massachusetts General Laws (Ter. Ed.), chapter 255, section 1, which was in force when the original mortgage was recorded, reads as follows:

> "Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the town where he then principally transacts his business. * * * The mortgage shall not be valid against a person other than the parties thereto until so recorded; * * *."†

***The pertinent provisions of these sections of the Massachusetts business corporation law, as well as of the chattel mortgage recording statute, are quoted further along in this brief.**

†The trustee in bankruptcy is not a party within the meaning of this section (*Duffy* v. *Charak*, 236 U.S. 97), and, admittedly, as successor to the rights of creditors under section 70 of the Bankruptcy Act, he may avoid the mortgage if the recording requirements have not been complied with.

The pertinent provisions of the Massachusetts Corporation Law, G.L. (Ter. Ed.) c. 156, are as follows:

Section 6.

"* * * The agreement of association shall state:

* * * * * * * * *

(c) The location of the principal office of the corporation in the commonwealth * * *."

Section 41.

"Every corporation may * * *, by the vote of a majority of all its stock, * * * authorize a change of the location of its principal office or place of business in this commonwealth * * *."

Section 43 provides that "articles of amendment" shall be filed with the Commissioner of Corporations within thirty days after the meeting and that no such amendment shall take effect until filed as aforesaid; but since it is agreed that no stockholder action was taken under section 41, section 43 has no application.

Issue.

As the Circuit Court of Appeals points out (R. 35), the only issue in this case is whether the chattel mortgage was properly recorded. This, in turn, raises the question of "what is the residence of a domestic corporation for purposes of the chattel mortgage recording act" (R. 37).*

***It cannot be successfully disputed that "if, according to law, the residence of the Rice Chocolate Company was in Boston at the time of the recording of this chattel mortgage, the mortgage must be invalid as between third parties for lack of proper re-**

The decision of this case turns upon a question of substantive—not procedural—law, the answer to which is to be found only in the applicable mortgage recording and corporation laws, exact compliance with which must be established if the petitioners are entitled to any consideration by this Court.

Summary of Argument.

The only reason that could possibly be advanced by the petitioners for the granting of their petition is that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

> Rule 38(5) of the Rules of the United States Supreme Court.

No other provision of this rule is applicable.

Notwithstanding the fervent protests of the petitioners to the contrary, it is nevertheless the fact, as stated by the Circuit Court of Appeals (R. 37), that—

> "the Supreme Judicial Court of Massachusetts has never had occasion to pass upon the meaning of the word 'resides' as used in the chattel mortgage recording act when applied to domestic corporations, nor to establish the effect of the Massachusetts corporation law in the circumstances here presented."

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cording" (R. 38), *Alexander* v. *F. L. Smithe Machine Co.*, 248 Mass. 436 (1924), nor is any exception made "with reference to those who have notice of an unrecorded mortgage as there is in case of an unrecorded deed of real property." *Connecticut Valley Onion Co.* v. *Pielock*, 281 Mass. 287, 290 (1932). This is a long-established rule. *Travis* v. *Bishop*, 13 Met. (54 Mass.) 304 (1847).

There are no "applicable local decisions" with which the instant decision can conflict; and no argument, however tenuous, such as that set forth on pages 5 to 11 of the petitioners' brief, can change that situation. The cases principally relied on by the petitioners as representative of the Massachusetts law on the subject—*Federal Trust Co.* v. *Bristol County Street Railway Co.*, 218 Mass. 367 (1914), and *Parker* v. *Proprietors of Cemetery of Mt. Auburn*, 217 Mass. 286 (1914)—are so effectively disposed of by the Circuit Court of Appeals (R. pp. 43-44) as to leave no room for discussion on that score.

Indeed, it is seriously to be doubted whether *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U.S. 642 (1916), which is the leading case on this subject and upon which the respondent principally relies, presents a situation or problem which would today be reviewed under a practice which makes the granting of a review on writ of certiorari a matter of sound judicial discretion. That case was one of the last of this kind which came up for review on appeal. The instant case presents no great or important question of law requiring the decision of this Court (especially in view of the strong line of authorities supporting the decision of the court below), nor is there anything in the conduct of the proceedings "to call for an exercise of this court's power of supervision."

The respondent contends that, for the purposes of recording chattel mortgages in Massachusetts, the "residence" of a domestic corporation is at the place of its principal office as designated in its agreement of association and articles of organization or amendments thereto duly voted, certified and filed; that because of the failure of the corporation to change the location of its principal office by formal amendment and subsequent recording of the same with the Secretary of State, its residence remained in Boston as it was originally

stated; and that the mortgage is invalid as against him because it was not recorded in Boston.

The respondent further contends that whether or not, as the petitioners claim, the Rice Chocolate Company resided in Everett for the purpose of taxation, automobile registration, service of process or dishonor of commercial paper, it did not reside in Everett within the meaning of the chattel mortgage recording act; and for this reason, as the Circuit Court of Appeals has so ably pointed out, the authorities relied upon by the petitioners are distinguishable and inapplicable.

Argument.

I.

The Mortgage is Invalid against the Trustee for Failure to Record in Boston.

Clearly, if recording *both* in Everett and in Boston was required, the mortgage was invalid.

> *Alexander* v. *F. L. Smithe Machine Co.*, 248 Mass. 436 (1924).

It can hardly be disputed that, whatever else might have been accomplished by the various things that were done after the bankrupt corporation moved to Everett, the "location of the principal office" of the corporation was never duly and formally changed from Boston to Everett, as a matter of Massachusetts corporation law.

> Massachusetts G.L. (Ter. Ed.) c. 156, secs. 6(*c*) and 41.

These provisions were enacted for the benefit of creditors—

> Opinion of Circuit Court of Appeals, R. 40, and cases cited—

and failure to comply with their requirements may be taken advantage of by a trustee in bankruptcy.

Fairbanks Steam Shovel Co. v. *Wills,* 240 U.S. 642, 648 (1916).

It is only when a corporation is not located by the terms of its charter that its residence can be regarded as being in the place where it keeps its principal office and does its corporate business.

Connecticut &c. R.R. Co. v. *Cooper,* 30 Vt. 476 (1858).

Fairbanks Steam Shovel Co. v. *Wills,* 212 Fed. 688, 692 (1914).

And that is the principal reason why the case of *Federal Trust Co.* v. *Bristol County Street Railway Co.,* 218 Mass. 367 (1914), so strongly relied upon by the petitioners in the courts below and before this Court (Petition, p. 9), is distinguishable.*

Opinion of Circuit Court of Appeals, R. 44.

Indeed, if anything, the *Federal* case is an authority for the respondent's position. The corporate books were kept, and the corporate business was transacted, in Boston; and, if the petitioners' position were correct, it would necessarily have followed, in that case, that the mortgage there in issue was not valid, for failure to record in Boston.

If, then, the statutory "location of the principal office of a corporation" is its legal residence for the purpose of re-

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***The statement in the Petition, at page 9, that it does not appear in the *Federal* case where the mortgage was recorded is entirely erroneous. The record of the case is replete with such references.**

cording chattel mortgages, it must necessarily follow that the mortgage in the case at bar was not properly recorded.

The two phrases in the mortgage recording statute—"where the mortgagor resides" and "where the mortgagor then principally transacts his business"—are two entirely different legal concepts. To confuse them, to hold in effect (as the petitioners claim) that they mean the same thing, is to violate the familiar canon of statutory interpretation that

> "every word of a legislative enactment is to be given force and effect so far as reasonably practicable. No part is to be treated as immaterial or superfluous unless no other rational course is open."
>
> *Commissioner of Public Works* v. *Cities Service Oil Co.*, 308 Mass. 349, 360 (1941).

As the Circuit Court of Appeals points out (R. 43):

> "If 'residence' is read as synonymous with the de facto principal place of business then the recording statute contains a redundancy in requiring that the chattel mortgage be recorded both where the mortgagor resides and where the mortgagor 'then principally transacts his business'."

It is this distinction which makes *Emerson* v. *Proctor*, 97 Me. 460, cited on page 10 of the Petition, inapplicable.

Under the Massachusetts statute, and because of the use of both phrases, an even stronger case is made out for the respondent than in the *Fairbanks* case and those following it, where recording was required only in the place where the mortgagor "resides."

The decision of the Circuit Court of Appeals not only has the support of logic and of practical expediency—it is the

settled view of all of the decisions on the subject, most of which are cited in the opinion on pages 40 and 41 of the record.

See, especially:

Fairbanks Steam Shovel Co. v. *Wills,* 240 U.S. 642 (1916).

Sweeney v. *Keystone Driller Co.,* 122 Ohio St. 16 (1930).

Matter of A. & B. Oil Co., 95 F. (2d) 946 (1938).

First National Bank et al. v. *Wilcox,* 72 Wash. 473 (1913).

The outstanding text-book on the subject has stated the rule as follows:

> "The place of residence of a corporation for the purpose of recording a mortgage by it, is the place where it keeps its principal office. In this connection, *its principal office becomes identified and definitely fixed by the location stated in its certificate of incorporation,* and such becomes the proper locus for recording its chattel mortgages where the statute requires such recording in the county of the mortgagee's residence * * *." (Italics ours.)
>
> Jones, The Law of Chattel Mortgages and Conditional Sales (6th Ed. Rev.), sec. 253.

And, interestingly enough, even the tax cases, upon which the petitioners strongly rely—some of which are included among the cases cited on page 10 of the Petition—recognize the distinction between "residence" for tax purposes and "residence" for the purposes of recording.

> "The statement in its Articles of Association will undoubtedly estop the relator later to say that that is

> not its residence for certain purposes such as *filing chattel mortgages* and service of process; but where it is apparent that the sole purpose is to avoid taxes, and that no office for business * * * is kept at the place mentioned in its articles, the municipality where its real office is kept may assess and tax its personal property." (Italics ours.)
>
> *Detroit Transportation Co.* v. *Detroit,* 91 Mich. 382, 390 (1892).

The *Fairbanks* case is squarely in point, both upon its facts and upon the principle of law involved; and would seem to be decisive of all questions in this case. The attempts of the petitioners, both in the courts below and before this Court (Petition, pp. 12-13), to dismiss it upon the ground that, while it had a "superficial similarity" to the case at bar, it was distinguishable because of a statement in the opinion that "an office was nominally maintained in Chicago" are utterly ridiculous. Not only was there no basis in the record for the statement but, as the Circuit Court of Appeals points out (R. 42),

> "there is not the slightest indication why the [Supreme Court] made the statement that it did nor that it laid any emphasis at all on the maintenance of a nominal office. We do not think that the opinion lends itself to the interpretation that a different result would have been reached had the facts been stated exactly as in the court below."

In any case, there was as much of a "nominal office" in the case at bar as in the *Fairbanks* case (R. 7-8).

In no situation is certainty as important as it is in the law of recording; and the requirement of designating the loca-

tion of the principal office of a corporation is one of the most important steps in that direction.

Compare *Western Transportation Co.* v. *Scheu*, 19 N.Y. 408, 410 (1859).

As the Circuit Court of Appeals has stated it (R. 45):

> "Our decision has at least the advantage of providing one definite and certain place where a creditor can always look for the recording of a corporate chattel mortgage."

The instant decision presents no real hardship as compared with the insuperable difficulties with which a prospective mortgagee would be confronted if, out of the various cities or towns in which a corporation might be doing business and guided only by the helter-skelter of decisions relied upon by the petitioners, such a mortgagee were compelled—in addition to having to decide where the corporation principally transacted its business (compare *Matter of A. & B. Oil Co., supra,* at p. 947)—to choose, at his peril, a place of "residence" for recording purposes.

It is respectfully submitted that, "since the mortgage in this case was not recorded at the residence of the corporation as fixed by its principal office designated in its unamended articles of association, the mortgage is invalid as against the trustee in bankruptcy" (R. 45), the herein respondent.

II.

The Authorities Relied upon by the Petitioners do Not Apply and are Distinguishable.

Almost without an important exception, every case cited by the petitioners to this Court was cited in the brief and argument before the Circuit Court of Appeals; and its opinion deals with, and disposes of, those cases and the arguments based thereon in much greater detail than would ordinarily be expected, probably because this was a case of first instance under the Massachusetts statutes.

Roughly speaking, these cases may, in the main, be divided into four classes:

a. those which deal with questions of procedure, venue or jurisdiction, of which cases like *International Milling Co.* v. *Columbia Transportation Co.*, 292 U.S. 511 (1933), and *Ex Parte Schollenberger*, 96 U.S. 369 (1877), are examples;

b. those which deal with changes of residence by individuals, of which *Marlborough* v. *Lynn*, 275 Mass. 394 (1931), is an example;

c. those which deal with questions of residence as related to the anomalous Massachusetts "trespasser on the highway" doctrine, all of which turn upon a special statutory definition of "non resident," of which *Harnden* v. *Smith*, 305 Mass. 485 (1940), and other cases cited on page 5 of the Petition are examples; and

d. those which deal with questions of residence as the basis for imposing a tax and are either evidence of the eternal conflict between two or more taxing authorities or arise out of active attempts to evade the payment of a tax, of which *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234 (1937), *Detroit Transportation Co.* v. *Detroit*, 91 Mich. 382 (1892), *Woodsum Steamboat*

Co. v. *Sunapee,* 74 N.H. 495 (1908), and, most of all, *Parker* v. *Proprietors of Cemetery of Mt. Auburn,* 217 Mass. 286 (1914), are examples.

In none of the earlier proceedings, whether before the Referee, the District Court, or the Circuit Court of Appeals, have the petitioners produced a single authority directly in point on the issue—nor have they done so in their Petition to this Court.

However freely it be admitted that the Rice Chocolate Company may have resided in Everett for any number of purposes (taxation, service of process, garnishment, etc.) at the time of the mortgage, it is a far cry to assume from this—and a definite *non sequitur* logically—that it also resided in Everett within the meaning of the applicable mortgage recording and business corporation statutes.

Conclusion.

The decision below is correct. In any case, there is no basis for a review under Rule 38(5). The petition should be denied.

Respectfully submitted,

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